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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DIANA VAZQUEZ et al., Plaintiffs and Appellants, v. WARREN DISTRIBUTING, INC. et al., Defendants and Respondents.	B292573 (Los Angeles County Super. Ct. No. BC595046)
HUGO GALLEGOS et al., Plaintiffs and Appellants, v. STREET CITY LOGISTICS et al., Defendants and Respondents.	B292575 (Los Angeles County Super. Ct. No. BC549552)

APPEALS from an order of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed in part, reversed in part, and remanded.

Strauss & Strauss, Michael A. Strauss; Mostafavi Law Group, Amir Mostafavi for Plaintiffs and Appellants.

Lewitt, Hackman, Shapiro, Marshall & Harlan, Sue M. Bendavid and Nicholas Kanter for Defendant and Respondent Warren Distributing, Inc.

Kaufman McAndrew, Stephen F. McAndrew; Miller Law Partners, Lee A. Miller for Defendant and Respondent Street City Logistics, Inc. and Street City Transportation, Inc.

Plaintiffs and appellants in these consolidated wage and hour actions worked as delivery drivers. Using their personal vehicles, they transported automobile parts throughout the Los Angeles area for defendant and respondent Warren Distributing, Inc. (Warren). Warren contracted for plaintiffs' services with defendants and respondents Street City Logistics, Inc. (SCL), Street City Transportation, Inc. (SCT), and Millennium Transportation, Inc. (Millennium), which either employed or independently contracted with plaintiffs.

Plaintiffs allege that defendants failed to adequately reimburse their driving-related expenses, which resulted in their pay effectively falling beneath the minimum wage. Plaintiffs further allege that defendants lacked or failed to communicate policies governing meal and rest periods, failed to timely provide plaintiffs with their meal breaks, and willfully failed to timely pay plaintiffs their final wages. Plaintiffs moved to certify two classes, one of employees and one of allegedly misclassified independent contractors, and sought civil penalties under the

Private Attorney General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.).[1] They supported their motion with declarations from the named plaintiffs and putative class members. The trial court struck most of their declarations, denied class certification, and dismissed plaintiffs' PAGA claim as unmanageable on a class-wide basis.

Plaintiffs contend each of these rulings was in error. First, they contend the court violated their due process rights and held them to an improper evidentiary standard when it struck all but two of their declarations for failing to comply with the translation rules set forth in California Rules of Court, rule 3.1110. We disagree. Plaintiffs had ample notice and opportunity to obtain certified translations of their declarations, and the court did not err in striking the nonconforming submissions.

Second, plaintiffs contend the court abused its discretion by denying their motion for class certification. With respect to their expense reimbursement claim, as well as the minimum and final wage claims predicated on that claim, plaintiffs argue that the trial court misapplied the holding of *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554 (*Gattuso*) and erroneously concluded that common issues of law and fact do not predominate. We disagree. The trial court did not abuse its discretion by concluding that the individualized inquiries necessary to litigate these claims rendered them unmanageable and inappropriate for class certification.

With respect to their meal and rest period claims, plaintiffs assert that the trial court improperly relied on their deposition testimony attesting to receipt of the breaks rather than analyzing

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[1]All further statutory references are to the Labor Code unless otherwise indicated.

their theories of liability. We reject this contention as to the meal period claim. The court did not abuse its discretion by looking to the depositions to conclude that the named plaintiffs' claims were not typical of the class. We agree with plaintiffs that the trial court erred with regard to their rest period claim, however. The court did not address either plaintiffs' theory of liability or the evidence. We therefore remand to allow the court to exercise its discretion in considering certification on the rest period claim.

Finally, we agree with plaintiffs that the trial court erred in dismissing their PAGA claim as unmanageable on a class-wide basis. Plaintiffs are not required to satisfy class action requirements to pursue civil penalties for Labor Code violations in a representative PAGA action. We accordingly reverse the order with respect to the PAGA claim and the rest period claim, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Parties

Defendant Warren is an auto parts distributor. It is headquartered in Santa Fe Springs and has eight additional satellite warehouses throughout Southern California. Warren uses delivery drivers to transport auto parts among its warehouses and to its customers. Warren "outsources" some of its delivery driving duties to other entities. Warren pays the entities, and the entities in turn pay the drivers. Those entities have included, at various points in time, defendants Millennium[2], SCL, and SCT.

Plaintiffs were (and, in some cases, are) Warren's "outsourced" drivers. They delivered auto parts for Warren but

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[2]Defendant Millennium is named as a respondent in this appeal but has not filed a respondent's brief.

worked for and were paid by defendants Millennium, SCL, and/or SCT.

II. The Gallegos Complaint

On June 23, 2014, named plaintiffs Hugo Gallegos and Miguel Chulde, individually and on behalf of others similarly situated (collectively "the Gallegos plaintiffs") filed a complaint against SCL, SCT, and 20 Doe defendants. The Gallegos plaintiffs alleged they were employed by SCL and its alter ego SCT as delivery drivers for Warren beginning on or about March 10, 2013. Gallegos was terminated from his employment in November 2013, but Chulde remained employed at the time the complaint was filed.

The Gallegos plaintiffs alleged SCL hired them as nonexempt employees and paid them an hourly wage. A portion of the hourly wage was earmarked to reimburse them for expenses they incurred while using their personal vehicles on the job. The Gallegos plaintiffs alleged this amount was not adequate to cover their actual driving expenses. They further alleged that SCL and SCT did not pay them the full amount of unpaid wages they were due in their final paychecks, did not pay them for unused vacation time, and did not provide them with legally mandated meal or rest breaks. The Gallegos plaintiffs asserted five causes of action based on this alleged conduct: conversion, failure to timely pay earned wages during employment and upon separation therefrom (§§ 201, 202, 203, 204, 218.5, 218.6, 227.3, 2698-2699.5), failure to reimburse expenses (§ 2802), failure to pay wages on regularly established paydays (§§ 204, 210, 2698-2699.5), and unfair business practices (Bus. & Prof. Code, § 17200 et seq.). The Gallegos plaintiffs

sought to represent a class of similarly situated individuals, and to recover civil penalties under PAGA.

III. The Vazquez[3] Complaint

On September 18, 2015, named plaintiffs Diana Vazquez, Jennyfer Herrera, Marcelino Solorzano Ascencio, and Regalado Villanueva de Guzman, individually and on behalf of others similarly situated (collectively "the Vazquez plaintiffs"), filed a complaint against SCL, SCT, Warren, and 20 Doe defendants. The Vazquez plaintiffs' allegations and claims were substantially similar to those asserted by the Gallegos plaintiffs.[4] The Vazquez plaintiffs added allegations that they were misclassified as independent contractors and should have been paid overtime wages. They asserted causes of action for misclassification, failure to provide accurate wage statements (§§ 226, 2698-2699.5), failure to pay overtime compensation (§§ 510, 1194, 2698-2699.5), failure to pay wages on regularly established paydays (§§ 204, 210, 2698-2699.5), failure to reimburse expenses (§ 2802), conversion, and unfair business practices (Bus. & Prof. Code, § 17200 et seq.). The Vazquez plaintiffs sought class action treatment and civil penalties under PAGA.

IV. Consolidation and Subsequent Complaints

The Vazquez plaintiffs filed a first amended complaint on November 3, 2015. They added Millennium as a defendant, alleging that it provided delivery drivers to Warren until

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[3]Named plaintiff Diana Vazquez's last name is spelled multiple ways throughout the record and in the briefing. We use the spelling Vazquez, as that is the spelling Vazquez used when she signed her declaration and during her deposition.

[4] The Vazquez plaintiffs were represented by the same counsel as the Gallegos plaintiffs.

approximately March 2013. On December 15, 2015, the trial court consolidated the Gallegos and Vazquez actions for certain purposes.

The Gallegos plaintiffs appear to have served, but not filed, a first amended complaint on March 9, 2016. Their first amended complaint added named plaintiffs and current drivers Humberto Rodriguez and Jose Munoz and additional defendants Warren and Millennium.

Both the Gallegos and Vazquez plaintiffs served but apparently did not file second amended complaints.[5] The only material difference between the two second amended complaints is that the second amended Vazquez complaint included a cause of action alleging that the Vazquez plaintiffs were misclassified as independent contractors, and the second amended Gallegos complaint did not. Both second amended complaints asserted the following twelve causes of action against all defendants, whom both sets of plaintiffs alleged were joint employers: failure to pay minimum wage (§§ 204, 1182.12, 1194, 1194.2, 1197, 2698-2699.5), failure to timely pay earned wages at separation of employment (§§ 201, 202, 203, 204, 218.5, 218.6, 227.3, 2698-2699.5), failure to pay vested vacation upon termination (§§ 227.3, 2698-2699.5), failure to provide meal and rest periods (§§ 226.7, 512, 2698-2699.5), failure to reimburse expenses (§§ 2802, 2698-2699.5), failure to pay wages on regularly established paydays (§§ 204, 210, 2698-2699.5), failure to pay

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[5] Warren asserts in its respondent's brief that these unfiled complaints are not operative, but it and the other defendants answered both second amended complaints without objection and otherwise have treated the second amended complaints as operative. We will do so as well.

overtime compensation (§§ 510, 1194, 2698-2699.5), liquidated damages for failure to pay minimum wage (§§ 1194, 1194.2, 2698-2699.5), unfair business practices (Bus. & Prof. Code, § 17200 et seq.), conversion and theft of labor (Civ. Code, §§ 3294, 3336), PAGA civil penalties (§§ 2698-2699.5), and failure to maintain records (§ 1174.5, Wage Order No. 4, § 7).

As noted above, all named defendants answered both second amended complaints.

V. Motion for Class Certification

On November 18, 2016, plaintiffs filed a motion[6] to certify two classes: an "Employee Driver Class" consisting of "All California-based drivers performing services for Warren Distributing, Inc. in California and paid as employees by Street City Logistics, Inc., Street City Transportation, Inc., and/or Millennium Transportation, Inc. during the time period of June 23, 2010 through the present," and a "Contractor Driver Class" consisting of "All California-based drivers performing services for Warren Distributing, Inc. in California and paid as independent contractors by Street City Logistics, Inc., Street City Transportation, Inc., and/or Millennium Transportation, Inc. during the time period of June 23, 2010 through the present." They sought to certify all of the named plaintiffs in the Gallegos and Vazquez actions "as representatives of the class."

A. Theories of Liability

Plaintiffs asserted numerous theories of liability in their certification motion; we include only the most relevant here. With respect to their expense reimbursement claim (section 2802

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[6]The Gallegos plaintiffs and the Vazquez plaintiffs filed separate motions but a single supportive memorandum of points and authorities.

claim), plaintiffs argued that the reimbursement they received was legally insufficient because it was less than the amount they would have received if defendants had used the per-mile reimbursement rate set by the federal Internal Revenue Service (IRS). Plaintiffs explained, "in 2014, the IRS mileage rate was $0.56 per mile. In 2014, the minimum wage was $9.00 per hour. So, if a driver for SCL drove 120 miles in an eight-hour day in 2014, SCL paid him $28 for his automobile expenses (at the rate of $3.50 per hour). Under the IRS reimbursement method, SCL would have been obligated to pay the driver $67.20 for his auto expenses. A shortfall of nearly $40 per day shows that the amount was unreasonable under California law."

Plaintiffs' theories of liability on their claims for failure to pay minimum wage and failure to timely pay all wages at termination were derivative of their section 2802 theory. They asserted that "Defendants' woefully inadequate auto expense reimbursement policy – and the failure to cover self-employment and other such taxes – also resulted in a failure to pay minimum wage under California law," and that "all minimum wages that Defendants failed to pay were due and owing at the termination/resignation of each former driver, and Defendants therefore failed to comply with sections 201 and 202."

Plaintiffs asserted multiple theories of liability for their meal and rest break claims. Their first theory of liability "for their meal periods claim is that the drivers, because they had to be in the field making deliveries and could only take their meal periods between deliveries, often had to take their meal periods after five hours." Their second theory of liability on the meal period claim was that defendants "never meaningfully communicated their meal period policies to the drivers, and

thereby did not 'provide' them as required by California law." Plaintiffs advanced a similar theory on their rest period claims: defendants' "policies – or lack thereof – are in violation of California law. . . . until SCL created formal rest period policies in 2015, the drivers were not authorized and permitted to take rest periods." Plaintiffs asserted that putative class members' timecards would support their meal period claims, and their "declarations reflect the reality that drivers did not receive lawful rest periods."

With respect to their PAGA claim, plaintiffs stated only, "An employee need not satisfy class action requirements to bring a representative action against an employer under the Private Attorneys General Act of 2004, Labor Code section 2698, et seq."

B. Certification Criteria

Plaintiffs argued they met all of the criteria for class certification. As relevant here, they contended that common issues of law or fact predominated because all the drivers had the same duties, pay structure, equipment, and terms and conditions of employment. Plaintiffs further contended that the named plaintiffs' claims were typical of the class, and their interests were "identical to the other class members since Defendants' policies and procedures applied to all of the drivers." Plaintiffs added that the named plaintiffs "supplied declarations outlining the terms and conditions of their employment, and their experiences were very similar to [or]identical to those of their coworkers who have also supplied declarations in support of this motion."

Plaintiffs assured the court that trial of their claims could be "easily managed." "If, indeed, Defendants are joint employers pursuant to California law . . ., Defendants' liability on each of

the claims will be simple to prove. Each claim is susceptible to common proof based largely on the binding admissions of Defendants' PMKs [persons most knowledgeable] and a simple analysis of payroll records. On the minimum wage claims, simple analysis of payroll records will determine whether Defendant [*sic*] paid the Putative Class members according to California minimum wage laws. Similarly, for the business expense reimbursement issue, it is simple to show that Defendants' uniformly applied reimbursement scheme was vastly insufficient, compared to the IRS reimbursement method, to cover costs incurred by Putative Class Members in the discharge of their duties for Defendants. The remaining claims are derivative of these primary claims, and will rise or fall therewith." Plaintiffs represented that they would further demonstrate manageability in their trial plan, "which will be submitted separately herewith."

C. Accompanying Evidence

Plaintiffs did not submit a trial plan concurrently with their class certification motion.[7] They did, however, file twelve declarations from the named plaintiffs and putative class members. Two of the declarations, those of named plaintiffs Vazquez and Herrera, were written exclusively in English. The ten remaining declarations were written in Spanish with accompanying English translations.

All of the declarants stated that they were required to take their meal breaks at the Warren warehouse and "oftentimes" were unable to take their meal breaks within five hours of their start time. They also uniformly stated that they were "never allowed to take a rest break." Named plaintiffs Vazquez,

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[7]Plaintiffs submitted their trial plan approximately 18 months later, on April 19, 2018.

Rodriguez, and Solorzano Ascencio, and putative class members Garcia and Ochoa stated that their automobile expenses exceeded the reimbursement they received "at all times." Named plaintiff Herrera and putative class member Garcia stated that SCL "never paid me enough to cover my automobile" expenses." The other declarants did not make statements about the adequacy of the reimbursement they received.

Plaintiffs also filed excerpts from depositions of defendants' PMKs. Millennium's corporate officer, Robert Brown, testified that Millennium provided drivers for Warren from June 23, 2010 to "either late 2012 or early 2013." During that time, Millennium's meal break policy was, "if you're working an eight-hour day, you need to take your lunch. If you don't take a lunch, you need to let us know." Brown further testified that drivers took their meal breaks "when it was appropriate for the client's business to facilitate it. So usually it could be anywhere from after three hours to no more than after five and a half, six hours." Brown also stated that Millennium never provided its meal break policy to the drivers in writing, and did not have any policy governing rest breaks. Brown stated that the drivers' wages ranged from "say, 11.75 to 14" dollars per hour, comprised of minimum wage plus a fixed hourly amount for automobile expense reimbursement.

SCL's PMK, Paola Leggs Covarrubias, testified that SCL began providing drivers for Warren in October 2012. Some were employees and others were independent contractors. All drivers were paid minimum wage "plus a certain amount per hour for mileage reimbursement"; Covarrubias did not believe that SCL ever provided expense reimbursement on a per-mile basis. She stated that she personally and individually determined each

driver's per-hour expense reimbursement amount, "[b]ased on the type of vehicle, the type of route location and gas prices." Covarrubias further testified that "[e]veryone's wages . . . they're different. Nobody gets the same - - no one gets the same reimbursement." Covarrubias testified that SCL provided workers with two paid 10-minute rest breaks per eight hour shift, and one unpaid meal period.

VI. Oppositions

A. Warren

Defendants each opposed class certification. In its opposition brief, Warren argued that common facts did not predominate the expense reimbursement, meal period, and rest period claims. Warren contended that "detailed, individualized inquiries" were necessary on the section 2802 claims because the drivers "used vastly different cars, drove different routes, different amounts of miles per day/week, incurred different expenses and were reimbursed different amounts. Some drove for others, while driving for SCL and [Millennium], and made varying personal uses of their cars. Most made errors and overstated their reported miles." It further argued that plaintiffs' theory of liability on the section 2802 claims "deprive[d] Defendants of their right to select other methods and show drivers were reimbursed for actual/necessary expenses." Warren provided the report of an expert who generally opined that data such as time cards, GPS records, and average automobile expenses demonstrated a need for individualized examination of plaintiffs' claims.

Warren asserted that plaintiffs' declaration statements regarding the lack and untimeliness of their meal and rest periods were contradicted by their deposition testimony and GPS

data.[8] It argued that the deposition testimony "shows drivers *knew* they were entitled to take breaks and took them," while the GPS data showed that drivers "had many break opportunities," and therefore that common facts did not predominate. Warren further relied on plaintiffs' deposition testimony to argue that "there is no evidence of company-wide policies to deprive drivers of breaks, or a lack of policy resulting in drivers being deprived of breaks. Rather, a formal policy existed and drivers knew it." Warren also argued that plaintiffs' meal and rest period claims could not be resolved by common proof.

Warren attached deposition testimony from ten named plaintiffs and putative class members; they all testified, contrary to their declarations, that they had never been on a delivery run that kept them away from the Warren warehouse for more than five hours.[9] Many of them also testified that they were aware of SCL's meal and rest period policies and acknowledged receiving meal and rest breaks. Warren also attached declarations from nine other drivers who stated that SCL had meal and rest period policies of which they were aware, and that they took their required breaks without issue.

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[8]As we discuss more fully below, it also argued that "all but 2 of the Spanish-to-English translations are not certified by a qualified translator under [California Rules of Court, Rule] 3.1110(g)" and "should be excluded on this basis." Warren concurrently filed a motion to strike the declarations that lacked certified translations. Plaintiffs opposed the motion to strike, relying on a federal case holding that evidence submitted in support of class certification need not be admissible.

[9]SCL and SCT attached the deposition of another named plaintiff who said the same thing.

B. SCL and SCT

SCL and SCT also contended in their joint opposition brief that plaintiffs failed to demonstrate that common questions predominated. Like Warren, SCL and SCT argued that plaintiffs' section 2802 claim and derivative wage claims would require individualized inquiries to establish both liability and defenses, and further argued that the evidence needed to perform these inquiries was not available. SCL and SCT also contended that plaintiffs' theory of liability on the expense reimbursement claim was legally incorrect, because it essentially obligated defendants to use the IRS mileage method and *Gattuso, supra*, 42 Cal.4th 554 held that other methods were permissible.

SCL and SCT challenged the veracity of plaintiffs' allegations and declarations regarding meal and rest periods. They asserted that they maintained policies on both types of breaks and, like Warren, contended that "every driver deposed admitted they received meal periods and there is no evidence to support the allegation that meal periods were not timely." SCL and SCT further argued that plaintiffs could not establish commonality on these claims, because "such claims will necessarily involve mini-trials regarding whether individuals received meal periods," and could not establish typicality because they "submitted false form declarations refuted by their deposition testimony, admitted they destroyed or discarded important evidence, testified they have no understanding of their responsibilities as class representatives, submitted a motion lacking in evidentiary support, and asserted incorrect theories of recovery."

Like Warren, SCL and SCT appended deposition excerpts to their opposition. They highlighted passages pertinent to

drivers' lack of knowledge of their actual expenses and how those compared to the reimbursement they received, and drivers' admissions they received meal breaks and rest periods. SCT and SCL also highlighted drivers' deposition testimony that each of their days varied in terms of routes and mileage.

C. Millennium

Millennium argued that class certification "will not provide substantial benefits both to the Courts and the litigants," because the court "is going to be bogged down at trial sussing out . . the time period(s) during which s/he was an employee versus an independent contractor and for whom." It further suggested that plaintiffs' claims against Millennium were not timely under the applicable statute of limitations, and that Millennium was not the corporate entity that paid drivers in any event.

With respect to the expense reimbursement claim, Millennium contended that drivers leased their vehicles to Millennium during the workday and therefore did not incur any automobile expenses. It also echoed SCL and SCT's arguments that plaintiffs' theory of liability was not legally correct under *Gattuso, supra*, 42 Cal.4th 554, and that plaintiffs lacked evidence of their actual expenses. Millennium additionally argued that common issues of law and fact did not predominate, trial of plaintiffs' claims would be unmanageable, and the named plaintiffs were not "typical" or adequate representatives because none of them had worked for Millennium.

VII. Trial Plan and Oppositions

Plaintiffs filed a trial plan on April 19, 2018, after defendants filed their oppositions to the class certification motion. Plaintiffs proposed presenting their case "through a combination of stipulations (assuming Defendants will enter into

stipulations), direct evidence (Defendants' own payroll records and written company policies), representative testimony by some of the putative class members, expert testimony, and Evidence Code section 776 testimony of Defendants' persons most knowledgeable."

Plaintiffs stated that they planned to prove their section 2802 claim without presenting any evidence of the expenses they actually incurred on the job. They asserted "actual vehicle expenses have no relevance in determining liability or aggregate damages in this action," because their theory was that defendants were liable for reimbursing them less than the amount they would have received under the IRS mileage reimbursement method. Plaintiffs further asserted that "there is no need for any form of individualized inquiry," because they could prove their damages using a class-wide calculation. Plaintiffs argued that defendants "will have the opportunity to present defenses regarding the factors relevant to calculating the reimbursement owed under the mileage reimbursement method, *i.e.*, what rate per mile is reasonable and should apply and the number of miles driven, and comparing the results to the lump sum Defendants actually paid." They further argued that defendants' argument otherwise—that individualized inquiry into actual expenses was required—"flies in the face of *Gattuso*."

Plaintiffs reiterated that their primary theory of liability on their meal period claim was that "the drivers, because they had to be in the field making deliveries and could only take their meal periods between deliveries, often had to take their meals after five hours." Plaintiffs planned to prove this theory using "a simple review of the drivers' time cards," as well as "representative testimony of some drivers" and testimony of

defendants' representatives. To prove their alternative theory, that defendants "never meaningfully communicated their meal period policies to the drivers, and thereby did not 'provide' them as required by California law," plaintiffs planned to rely on "representative testimony of some drivers to establish that Defendants never complied with California law by providing meal periods." Plaintiffs also planned to use testimony from defendants' representatives to prove that defendants did not inform plaintiffs of their meal policies. Plaintiffs planned to prove their identical rest period theory the same way.

With respect to their PAGA claim, plaintiffs stated the following: "The Court decides the amount of PAGA penalties to apply if violation [*sic*] is found. [Citation.] The amount awarded is on a per pay period basis. [Citation.] If a stipulation is not reached as to the total pay periods during the PAGA liability period, Plaintiff [*sic*] will present testimony through its experts as to the total Class Member pay periods during the PAGA liability period."

Defendants opposed plaintiffs' trial plan. Warren argued that plaintiffs' plan deprived defendants of their right to establish that plaintiffs were fully reimbursed for expenses they actually and necessarily incurred. Both Warren and SCL/SCT also argued that plaintiffs misapplied *Gattuso*, *supra*, 42 Cal.4th 554. Millennium argued that the section 2802 claim would be unmanageable because it would require "a mini-trial for each putative class member." Warren and Millennium both argued that plaintiffs failed to show how their meal and rest break claims could be managed, since each would require an individualized analysis. SCL/SCT argued that plaintiffs' plan to try the meal and rest break claims was "based upon a

misrepresentation of the facts," and pointed again to the deposition testimony in which the named plaintiffs and other putative class members admitted receiving the breaks to which they were entitled.

Warren acknowledged that plaintiffs' PAGA claim "need not satisfy class action requirements," but argued that "same consideration for manageability of individualized issues must be made for PAGA," because "no action can go forward if the trial plan would prevent defendants from presenting affirmative defenses or abridge substantive due process rights." "To recover PAGA penalties, Plaintiffs must prove violations for *each driver*. Plaintiffs have not shown how a trial as to each driver can be managed in light of the individual issues that predominate Plaintiffs' claims."

VIII. Hearing and Ruling

The court heard the class certification, trial plan, and related motions on July 26, 2018. At the outset of the hearing, the court indicated that it was inclined to grant Warren's motion to strike the declarations that were not translated by a certified, qualified interpreter. The court noted that the effect of doing so "would be that there are no plaintiffs from Millennium, because that only leaves Herrera and Vazquez" (both named plaintiffs in the Vazquez action). Plaintiffs' counsel requested leave to provide "translated declarations"; the court responded, "you provided translated declarations. They just did not satisfy the rules of court. . . . " The court added that the problem was "unusual," since plaintiffs' motion for class certification had been pending for nearly two years, and the motion to strike the declarations had been pending for nearly six months with no corrective action by plaintiffs. The court ultimately told

plaintiffs' counsel that it would give the entire case "a second look" after the hearing, and accordingly would allow plaintiffs to submit certified interpretations of the declarations "within seven days." The court cautioned plaintiffs' counsel, "I'm very iffy on whether this is going to meet class certification," so "you may not wish to undergo the expense, if there is a substantial expense."

The court further indicated that its initial tentative was to grant certification on the section 2802 claim and derivative wage claims, because the court believed "it is possible to lump those claims together for class cert by using the defendants' own records." The court also indicated an inclination to certify a class regarding defendants' status as joint employers. It stated that it was not inclined to certify classes on the meal and rest period claims, because the two declarations without translation issues were "totally inconsistent" with the deposition testimony from other putative class members, giving rise to "no typicality at all." The parties spent the remainder of the hearing presenting argument on the section 2802 claim. The court took the matter under submission.

Four days later, on July 30, 2018, the court issued a written ruling. As relevant here, it first rejected plaintiffs' contention that evidence submitted at the class certification stage—namely, their improperly translated declarations—need not be admissible. The court found the federal case law plaintiffs cited unpersuasive and distinguishable, and further noted that nothing precluded plaintiffs from obtaining proper translations or correcting the defects once alerted to them. The court noted that it had granted plaintiffs leave to correct the translations, but "given the court's reversal of its tentative ruling, the issue is moot."

The court next declined to certify plaintiffs' expense reimbursement and derivative minimum wage claims. The court gave two reasons for this ruling. First, it concluded the trial plan was inadequate because it foreclosed Warren's ability to assert its affirmative defense that the reimbursement was sufficient to cover necessary expenses the drivers incurred. The court noted that plaintiffs' trial plan instead "proposes to deem any reimbursement inadequate if it was less than the applicable IRS mileage rate, without regard for the actual expenses the drivers incurred." As a second reason for denying certification, the court concluded that plaintiffs failed to demonstrate the predominance of common questions of law and fact. It explained, "the drivers drove a wide variety of vehicles. [Plaintiffs have] not analyzed the actual costs these drivers incurred, and compared those costs to the applicable IRS mileage rates. [Plaintiffs have] therefore not presented any evidence on how many drivers received less than their incurred costs in reimbursement. The court cannot determine if common questions of law and fact predominate, such that certification is appropriate."

The court also denied class certification on the meal and rest break claims on the ground that plaintiffs "failed to demonstrate that class treatment of these claims is appropriate." The court reasoned that the deposition testimony from numerous class members on these issues was inconsistent with plaintiffs' two admissible declarations, those of named plaintiffs Vazquez and Herrera. Vazquez and Herrera stated in their declarations that they were required to take their meal breaks at Warren's warehouse, they did not receive meal breaks in timely fashion if they could not return to the warehouse within five hours, they recorded meal breaks on their timesheets even if they did not

take them, and they were never permitted to take rest breaks. The court found that the Vazquez and Herrera declarations were inconsistent with other putative class members' depositions. The court specifically pointed to the deposition testimony of named plaintiffs Hugo Gallegos, Miguel Chulde, Humberto Rodriguez, Jose Armando Munoz Romero, Marcelino Solorzano Ascencio, and Regalado Villanueva de Guzman, all of whom testified that they took 30-minute meal breaks every day. Gallegos, Rodriguez, and Villanueva de Guzman also testified that they knew they were entitled to these breaks within five hours of starting their shifts. The court also pointed to similar testimony in the depositions of six putative class members. The court concluded from these depositions that plaintiffs failed to meet their burden of demonstrating that common questions of law or fact predominated: "the evidence before the court suggests that Va[z]quez and Herrera had atypical experiences if they were unable to take meal breaks." It did not further address rest breaks.

The court also concluded that plaintiffs failed to meet their burden of demonstrating that trial of their representative PAGA claims was manageable. The court recognized that the PAGA claims "are representative claims, which do not require certification," but added "as in a class action, in a PAGA action, the burden is on the plaintiff to establish any violations of the Labor Code. . . ." The court continued, "[f]or that reason, a representative plaintiff in [a PAGA action] must seek to render trial of the action manageable." The court found that plaintiffs failed to carry the burden of demonstrating manageability "on a class-wide basis."

Plaintiffs timely appealed the court's rulings in both the Vazquez and Gallegos actions under the death knell doctrine. (See *In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757.) The parties filed all of their substantive materials in the Vazquez matter; the filings in the Gallegos matter incorporate the Vazquez filings by reference. We ordered the matters consolidated for argument and resolution.

DISCUSSION

I. Striking the Declarations

Plaintiffs contend the court erred in striking most of the declarations they submitted in support of their motion for class certification. They first argue that the plain language of California Rules of Court, rule 3.1110(g) "did not apply to the English versions" of the declarations, because the rule refers only to exhibits "written in a foreign language." Considering the court's interpretation of the rule de novo, we disagree. (See *Roth v. Plikaytis* (2017) 15 Cal.App.5th 283, 291 & fn. 7; *Ponce v. Wells Fargo Bank* (2018) 21 Cal.App.5th 253, 261.)

Rule 3.1110(g), entitled "Translation of exhibits," provides that "Exhibits written in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter." All but two of the declarations included as exhibits to plaintiffs' class certification motion were written in Spanish with English translations. Some of declarations were single documents that contained statements written in both Spanish and English, while others came in pairs—a declaration fully written in Spanish accompanied by a separate, complete English translation. Plaintiffs contend Rule 3.1110(g) does not apply to the English halves of the English-Spanish declaration pairs, because they are not "written in a foreign language," and

there is "no indication that the declarants were unable to read or understand English or that the English versions were translations of the Spanish version." This argument is not persuasive. If the English versions were not translations of the accompanying Spanish versions, there would have been no reason for plaintiffs to prepare or include the Spanish versions. When it is apparent from the circumstances that an exhibit written in English is a translation of an accompanying exhibit written in a foreign language, it would be absurd to read Rule 3.1110(g) as plaintiffs suggest.

Plaintiffs next contend the court erred in striking the declarations on admissibility grounds at the class certification stage. Relying on *Sali v. Corona Regional Medical Center* (9th Cir. 2018) 909 F.3d 996, 1004 (*Sali*), plaintiffs argue that "applying a formal stricture of a translator's certification had the result of making the certification hearing an evidentiary shooting match." We are not persuaded. Although "California courts may look to federal rules on procedural matters" in class actions (*Gonzales v. San Gabriel Transit, Inc.* (2019) 40 Cal.App.5th 1131, 1151), we are not bound to do so.

Sali is distinguishable in any event, as it reasoned that "the evidence needed to prove a class's case often lies in a defendant's possession and may be obtained only through discovery. Limiting class-certification-stage proof to admissible evidence risks terminating actions before a putative class may gather crucial admissible evidence. And transforming a preliminary stage into an evidentiary shooting match inhibits an early determination of the best manner to conduct the action." (*Sali*, *supra*, 909 F.3d at p. 1004.) These concerns are not present here, as the declarations and translations were entirely within

plaintiffs' control. Moreover, the *Sali* court "found an abuse of discretion where a 'district court limited its analysis of whether' class plaintiffs satisfied a Rule 23 requirement 'to a determination of whether Plaintiffs' evidence on that point was admissible.'" (*Ibid.*) The trial court here did not restrict its analysis in this way. *Sali* accordingly is inapposite.

Plaintiffs finally contend that the "trial court's about-face on its decision to allow Appellants an opportunity to cure the deficiencies in the declarations was erroneous," because the trial court changed its interim order without providing plaintiffs with an opportunity to litigate the question. They further argue that the error was prejudicial, because the trial court "went on to find that Appellants failed to meet their burden of showing the predominance of common questions of law and fact." We disagree. Here, as the court observed, nearly six months elapsed between the filing and adjudication of Warren's motion to strike. Plaintiffs could have obtained certified translations of some or all of the Spanish declarations during that time. They failed to do so, and were unable to provide the trial court with a satisfactory explanation after litigating the issue at the hearing. The court was not required to grant plaintiffs additional time to comply with a standard court rule.

Even if the court erred in failing to give plaintiffs the promised seven days to submit certified translations before it ruled on the motion, we find that plaintiffs have failed to demonstrate that they were prejudiced.[10] The court did not rely on the dearth of declarations to make its ruling. Instead, it

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[10]We note that there is no indication in the appellate record that plaintiffs prepared or obtained the certified translations or were in the process of doing so.

contrasted the remaining declarations with the ample deposition testimony directly contradicting them and concluded that the meal break experiences Vazquez and Herrera described in their declarations were "atypical." Plaintiffs have not demonstrated how the stricken declarations, which contained, nearly verbatim, the same assertions as the Vazquez and Herrera declarations, would have aligned with the depositions or otherwise demonstrated typicality. We accordingly find that plaintiffs were not prejudiced.

II. Denial of Class Certification

A. Legal Principles

A class action is a procedural device used to aggregate claims when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." (Code Civ. Proc., § 382.) "The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).) "'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."' [Citation.]" (*Ibid.*) As the party seeking certification, plaintiffs bear the burden of demonstrating all three community of interest factors. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104 (*Lockheed*).) Only the first two, predominance and typicality, are at issue here.

To establish predominance, plaintiffs must "place substantial evidence in the record that common issues *predominate*." (*Lockheed*, *supra*, 29 Cal.4th at p. 1108.) "'[T]his means "each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants."' [Citation.]" (*Ibid.*) Whether common questions predominate "will often depend upon resolution of issues closely tied to the merits" of the claims, even though the certification of a class is a procedural question that generally does not turn on whether an action is legally or factually meritorious. (*Brinker*, *supra*, 53 Cal.4th at pp. 1023-1024.) "To assess predominance, a court 'must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.' [Citation.] It must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence. [Citation.] In turn, whether an element may be established collectively or only individually, plaintiff by plaintiff, can turn on the precise nature of the element and require resolution of disputed factual or legal issues affecting the merits." (*Id.* at p. 1024.) At bottom, predominance is a factual question for the trial court. (*Id.* at p. 1022.)

The second community of interest requirement, typicality, refers to the nature of the class representative's claim, not the specific facts from which it arose or the specific relief sought.

(*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375.) The purpose of the typicality requirement is to ensure that the class representative's interests align with those of the broader class. (*Ibid.*) The test of typicality is whether the action is based on conduct not unique to the named plaintiffs, whether the other class members experienced and have been injured by the same course of conduct as the named plaintiffs, and whether the other class members suffered the same or similar injury as the named plaintiffs. (*Ibid.*)

"On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for manifest abuse of discretion: "Because trial courts are ideally suited to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]'" (*Brinker*, *supra*, 53 Cal.4th at p. 1022.) However, in conducting our review, we examine the trial court's "actual reasons for granting or denying certification; if they are erroneous, we must reverse, whether or not other reasons not relied upon might have supported the ruling." (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530.)

B. Expense Reimbursement (Section 2802) Claim

Plaintiffs argue that the trial court erred in denying certification of their section 2802 expense reimbursement claim and, by extension, their derivative minimum and final wage

claims.[11] They contend that both of the trial court's reasons for denying certification on these claims, improper foreclosure of Warren's affirmative defense and lack of predominating common questions, were erroneous, "because they rest upon a misreading of *Gattuso* and do not recognize that Respondents cannot prove their affirmative defense." We find no abuse of discretion.

1. Section 2802 and *Gattuso*

Section 2802, subdivision (a) requires "an employer"[12] to "indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer . . . ." "Necessary expenditures or losses" are defined to include "all reasonable costs" incurred by the employee in the discharge of his or duties. (§ 2802, subd. (c).) The purpose of section 2802 is to prevent employers from passing their operating costs onto their employees. (*Gattuso*, *supra*, 42 Cal.4th at p. 562.) Section 2804 expressly prohibits employees from waiving the benefits of section 2802. (*Id.* at p. 561; see also § 2804.)

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[11]In a footnote, plaintiffs contend that they also raised these claims under Business and Professional Code section 17200, and the trial court "erred by not addressing this claim." "Footnotes are not the appropriate vehicle for stating contentions on appeal," and "'[w]e do not have to consider issues discussed only in a footnote.'" (*Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947.)

[12]We are not presented with and do not consider the question of whether defendants were plaintiffs' "employers" for purposes of this statute. We use the words "employee" and "employer" as they are used in the relevant statutory and case law.

In *Gattuso*, the Supreme Court considered whether section 2802 permitted an employer to reimburse its employees for automobile expenses they incurred in performing their work duties by increasing their "overall compensation rather than through a separately identified reimbursement payment." (*Gattuso*, *supra*, 42 Cal.4th at pp. 567-568.) The defendant employer, a corporation that prepared and distributed advertising booklets, employed "inside" sales representatives who sold advertising space via telephone and "outside" sales representatives who sold advertising space via in-person meetings. (*Id.* at p. 559.) The outside sales representatives used their own automobiles to meet with their customers. (*Ibid.*) The defendant compensated them for the expenses they incurred in doing so "by paying them higher base salaries and higher commission rates than it pays to inside sales representatives." (*Id.* at p. 560.) The plaintiff outside sales representatives alleged that the defendant employer violated section 2802 by reimbursing them in this fashion. (*Ibid.*)

The Supreme Court ultimately concluded that "[n]othing in the language of section 2802 restricts the methods that an employer may use to calculate reimbursement," "provided that the amount paid is sufficient to provide full reimbursement for actual expenses necessarily incurred." (*Gattuso*, *supra*, 42 Cal.4th at p. 570.) In reaching that conclusion, the Court discussed three possible methods employers might use to reimburse employees for automobile expenses.

The first, which the parties agreed was permissible under section 2802, was the "actual expense method." This method "is the most accurate, but it is also the most burdensome for both the employer and the employee" because it requires extensive record

keeping of expenditures on fuel, maintenance, repairs, insurance, registration, and depreciation, as well as information needed to apportion those expenses between business and personal use. (*Id.* at p. 568.) The employee then submits this information to the employer, which may exercise judgment to determine whether the expenses were reasonable and necessary before reimbursing the employee. (*Ibid.*) The Court recognized that few employers use the actual expense method because of the onerous burdens it imposes. (*Id.* at p. 569.)

The second method the Court discussed was the "mileage reimbursement method." (*Gattuso*, *supra*, 42 Cal.4th at p. 569.) Under this method, which is "inherently less accurate" than the actual expense method, "the employee need only keep a record of the number of miles driven to perform job duties. The employee submits that information to the employer, who then multiplies the work-required miles driven by a predetermined amount that approximates the per-mile cost of owning and operating an automobile." (*Ibid.*) The Supreme Court noted that the "IRS mileage rate is . . . widely used and accepted by private business employers for calculating reimburseable employee automobile expenses." (*Ibid.*) It also recognized that, subject to the limitations of section 2804, the per-mile rate "may be a subject of negotiation and agreement between employer and employee." (*Ibid.*) Thus, it did not require use of the IRS mileage rate. The Court further noted that the parties in *Gattuso* agreed that "if an employer uses the mileage reimbursement method, the employee must be permitted to challenge the resulting reimbursement payment," and if he or she shows "that the reimbursement amount that the employer has paid is less than the actual expenses that the employee has necessarily incurred for work-

required automobile use (as calculated using the actual expense method), the employer must make up the difference." (*Id.* at p. 569.)

The third reimbursement method the Court discussed was the "lump-sum method." "Under this method, the employee need not submit any information to the employer about work-required miles driven or automobile expenses incurred. The employer merely pays a fixed amount for automobile expense reimbursement. The fixed amount may take various forms and have various labels, including per diem, car allowance, and gas stipend. The amount is generally based on the employer's understanding of the employee's job duties, including the number of miles that the employee typically or routinely must drive to perform those duties." (*Gattuso*, *supra*, 42 Cal.4th at p. 570.) The defendant in *Gattuso* used a variant of the lump-sum method, which the Supreme Court held was permitted by section 2802, "provided the employer establishes some means to identify the portion of overall compensation that is intended as expense reimbursement, and provided also that the amounts so identified are sufficient to fully reimburse the employees for all expenses actually and necessarily incurred." (*Id.* at p. 575.) The Supreme Court also reiterated that "an employee must be permitted to challenge the amount of a lump-sum payment as being insufficient under section 2802," and explained that the employee "may do so by comparing the payment with the amount that would be payable under either the actual expense method or the mileage reimbursement method. If the comparison reveals that the lump sum is inadequate, the employer must make up the difference." (*Id.* at p. 571 .)

2. Analysis

The final two sentences quoted above form the basis of plaintiffs' theory of liability on their section 2802 claim and derivative claims: that an employee may challenge the adequacy of a lump-sum reimbursement "by comparing the payment with the amount that would be payable under either the actual expense method *or the mileage reimbursement method*," (emphasis added) and that "the employer must make up the difference" if "the lump sum is inadequate." (*Gattuso*, *supra*, 42 Cal.4th at p. 571.) Plaintiffs contend that the hourly lump sum[13] defendants paid them as reimbursement for their automobile expenses "was insufficient when compared to what should have been paid under the mileage reimbursement method, using the IRS mileage rate." Using this method of comparison, plaintiffs contend, absolves them of any need to produce evidence of their actual expenses.

The trial court disagreed. It concluded that omitting evidence of actual expenses from trial would impede defendants' ability to argue that the reimbursement amounts were "sufficient

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[13]Defendants dispute that their method of expense reimbursement may be characterized as a "lump-sum method," because they "relied on information submitted by the drivers about miles driven and hours worked." We need not resolve this dispute, though we note that *Gattuso*, *supra*, 42 Cal.4th at p. 570 states that a lump-sum reimbursement "is generally based on the employer's understanding of the employee's job duties, including the number of miles that the employee typically or routinely must drive to perform those duties." It further states that "an employer and an employee may agree on a particular lump sum to be paid as automobile reimbursement" (*id.* at p. 571), suggesting that uniformity of the reimbursement sum is not the defining feature of a "lump-sum method."

to fully reimburse the employees for all expenses actually and necessarily incurred." (*Gattuso*, *supra*, 42 Cal.4th at p. 575.) This was not a "misreading of *Gattuso*" or otherwise an abuse of the trial court's discretion. *Gattuso* makes clear that the ultimate question in section 2802 litigation is whether the employees were fully reimbursed. It specifically agreed with the defendant's assertion that "section 2802 requires only that whatever method is used result in full reimbursement for actual expenses necessarily incurred by the employee." (*Id.* at p. 570.) The employee's actual expenses are thus relevant regardless of the reimbursement method the employer uses, or that the employee thinks the employer should use. Reimbursement is inadequate under section 2802 only if it is "less than the actual expenses that the employee has necessarily incurred for work-required automobile use (as calculated using the actual expense method)." (*Id.* at p. 569.)

When an employee challenges the adequacy of the reimbursement he or she received under section 2802, he or she bears the burden of showing that the reimbursement was less than the expenses necessarily incurred. The employer likewise may defend against the claim by showing that the employee was adequately reimbursed for the expenses he or she necessarily incurred. "[A] class action trial management plan must permit the litigation of relevant affirmative defenses, even when these defenses turn on individual questions." (*Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1, 25.) Plaintiffs' trial management plan did not allow for the introduction or exploration of evidence relevant to their actual expenses. The court accordingly did not abuse its discretion in concluding that the plan was inadequate and precluded certification.

Plaintiffs argue that "by not carefully evaluating the nature of the proof that Respondents would have to present to support this affirmative defense, and by not recognizing that evidence does not exist to support such a defense, the trial court conducted an incorrect legal analysis." We are not persuaded the trial court erred. The court considered the depositions and other evidence the parties attached to their filings, and these documents contained evidence of the types of vehicles plaintiffs drove and the miles they drove each day. Evidence of plaintiffs' other expenses, such as insurance costs or car payments, may be obtainable through discovery mechanisms. Plaintiffs suggest that defendants "would have to provide evidence of all the information that an employee would have to submit if the employer had used the actual expense reimbursement method," but the ultimate success of an affirmative defense is a question for the trier of fact, not for the court at the certification stage.

Plaintiffs also argue that their trial plan did not foreclose defendants "from presenting evidence of what they believed would be a more appropriate mileage rate." This argument ignores *Gattuso*'s teaching that section 2802 does not restrict the methods that an employer may use to calculate reimbursement (*Gattuso*, *supra*, 42 Cal.4th at p. 570), by essentially forcing defendants to use the mileage reimbursement method. Plaintiffs further assert that "the choice of the proper mileage reimbursement rate is a common issue," because *Gattuso* does not state that the mileage reimbursement rate "must approximate the per-mile cost of owning and operating *the employee's* automobile." Defendants' method of reimbursement is not the relevant issue, however; the issue is whether plaintiffs were reimbursed for the expenses they incurred.

The trial court also denied certification of plaintiffs' section 2802 and related claims because plaintiffs have "not demonstrated that common issues of law and fact predominate." Specifically, the trial court found that plaintiffs failed to "present any evidence on how many drivers received less than their incurred costs in reimbursement." Plaintiffs argue that the court's "focus on drivers' actual expenses was misplaced," because "the drivers are expressly permitted to challenge the adequacy of their lump-sum reimbursement by comparing it to what they would be paid under the actual expenses method *or* the mileage reimbursement method." As explained above, this argument misconstrues the ultimate holding of *Gattuso*.

Plaintiffs further contend that "[c]ommon issues do indeed predominate," listing as examples "whether class members were misclassified as independent contractors," "Respondents' status as joint employers, the legality of Respondents' reimbursement policies, the drivers' job duties, the mileage- and time-recording procedures mandated by Respondents and practiced by the drivers, the denial of itemized paycheck stubs to the independent contractor drivers, and Respondents' denial of having reimbursed drivers under the lump-sum method." These issues are largely irrelevant to plaintiffs' section 2802 claim and their theory of liability thereon. The court did not abuse its discretion by focusing its predominance analysis on the individualized facts relevant to the section 2802 claim, namely drivers' actual expenses.

C. Meal Period Claim

Plaintiffs brought their meal period claim under section 512, subdivision (a), which provides that "An employer shall not employ an employee for a work period of more than five hours per

day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee."[14] This statute "requires a first meal period no later than the start of an employee's sixth hour of work." (*Brinker*, *supra*, 53 Cal.4th at p. 1041.) Relying on *Godfrey v. Oakland Port Services Corp.* (2014) 230 Cal.App.4th 1267, 1285-1286, and *Bradley v. Networkers International, LLC* (2012) 211 Cal.App.4th 1129, 1149-1150, Plaintiffs also argued that defendants' alleged failure to meaningfully or consistently communicate a meal period policy to them violated the statute. They now contend that the court abused its discretion by failing to specifically address these theories when it denied class certification on the basis that the Vazquez and Herrera declarations attesting to a lack of knowledge of defendants' meal period policies and inability to take meal breaks were atypical of the class. We disagree.

At the class certification stage, plaintiffs bear the burden of showing that the action "is based on conduct not unique to the named plaintiffs," other class members have been injured by the same conduct as the named plaintiffs, and that the injuries suffered by the named plaintiffs and the rest of the class are the

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[14]Plaintiffs also invoked section 226.7. Subdivision (b) of that statute provides that an employer "shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute." Section 226.7, subdivision (c) provides that an employer that fails to provide a meal or rest or recovery period in accordance with state law "shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided."

same or similar. (*Martinez v. Joe's Crab Shack Holdings*, *supra*, 231 Cal.App.4th at p. 375.) The trial court found that plaintiffs did not carry this burden of demonstrating typicality, because the declarations from named plaintiffs Vazquez and Herrera were inconsistent with deposition testimony from numerous other class members, including additional named plaintiffs.

The trial court implicitly acknowledged plaintiffs' theories by pointing to statements in Vazquez's and Herrera's declarations and other class members' depositions relevant to those theories. Substantial evidence supports its conclusion that named plaintiffs Vazquez and Herrera did not have claims typical of the class; each of the numerous depositions the court specifically cited facially contradicted the assertions made by Vazquez and Herrera. Lack of typicality is an appropriate criterion on which to deny class certification, and plaintiffs have not identified any erroneous legal assumptions underlying the trial court's ruling on the meal break claim. We accordingly conclude the trial court did not abuse its discretion in denying the certification motion as to this claim. (See *Brinker*, *supra*, 53 Cal.4th at p. 1022.)

D. Rest Period Claim

Under California law, employers have "a duty to authorize and permit rest breaks; the number of breaks depends on the length of the shift." (*Bradley v. Networkers International, LLC*, *supra,* 211 Cal.App.4th at p. 1149, citing Cal. Code Regs., tit. 8, § 11040, subd. 11.) Plaintiffs allege that defendants "are liable for rest period premiums under Labor Code section 226.7 because they failed to meaningfully inform the drivers that they could take rest periods." They contend the trial court erred by failing

to discuss their rest period claim and theory of liability in its order denying class certification. We agree.

In its ruling, the trial court stated that plaintiffs "contend[ ] the drivers also did not receive adequate meal or rest periods. [Plaintiffs have] failed to demonstrate that class treatment of these claims is appropriate. The motion for class certification is denied as to these claims." The trial court's ensuing analysis focused exclusively on the meal period claim, however, by highlighting deposition testimony contrary to Vazquez's and Herrera's declarations about meal breaks. The trial court did not provide any reason for denying certification of the rest period claim. We accordingly are unable to discern its "actual reasons for granting or denying certification." (*Ayala v. Antelope Valley Newspapers, Inc.*, *supra*, 59 Cal.4th at p. 530.)

In most circumstances, "it is judicial action, and not judicial reasoning or argument, which is the subject of review; and, if the former be correct, we are not concerned with the faults of the latter." (*Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 330.) When reviewing an order granting or denying class certification, however, "appellate courts *only review* the *reasons stated by the trial judge* in certifying or denying certification, and will not affirm simply because 'there may be substantial evidence to support the court's order.'" (Weil et al., Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2020) ¶ 14:107.6; see also *Ayala v. Antelope Valley Newspapers, Inc.*, *supra*, 59 Cal.4th at p. 530.) When an order denying certification "is devoid of any explanation and nothing in the record of the hearing or anywhere else in the record illuminates the trial court's thinking," we "cannot tell if improper criteria were used or erroneous legal assumptions were made." (*Tellez v. Rich Voss Trucking, Inc.*

(2015) 240 Cal.App.4th 1052, 1064-1065.) Our standard of review "requires that there be some enunciation of a reason or basis for denial of class certification from which we can determine the soundness of the lower court's decision. To hold otherwise would mean that in every case where there is a denial of class certification without explanation in the order or in the record, appellate courts would be placed in the role of trial courts, in essence, deciding the matter de novo and supplying a rationale not stated by the trial court." (*Id.* at p. 1065.) In light of our inability to discern the rationale for the trial court's denial of class certification on the rest period claim, "we must remand the case to the trial court to reconsider the motion, and in the event that it again denies the motion, articulate its reasoning." (*Ibid.*)

III. Dismissal of PAGA Claims

In addition to their class action claims, plaintiffs asserted a cause of action for civil penalties under PAGA. The trial court dismissed plaintiffs' PAGA claims after finding that plaintiffs failed to demonstrate that trial of the claims would be manageable "on a class-wide basis." Plaintiffs contend that the trial court "improperly applied the class action requirement of manageability to the PAGA claims when Appellants did not seek certification of the PAGA claims." They alternatively argue that they demonstrated that trial of their PAGA claims would be manageable, the trial court lacked the authority to dismiss the PAGA claims at the class certification stage of the case, and the trial court violated their due process rights by dismissing the claims on its own initiative. We agree with plaintiffs' first argument and accordingly reverse the dismissal of their PAGA claims. We need not and do not consider plaintiffs' alternative arguments.

A. Legal Principles

The Labor Code "contains a number of provisions designed to protect the health, safety, and compensation of workers. Employers who violate these statutes may be sued by employees for damages or *statutory* penalties." (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 80 (*Kim*).) Some Labor Code provisions also provide for additional civil penalties, which are generally paid to the state. (*Ibid.*) Because the state was "hampered" in its pursuit of civil penalties due to staffing constraints and inadequate funding, "the Legislature enacted PAGA, authorizing 'aggrieved employees' to pursue civil penalties on the state's behalf." (*Id.* at p. 81.) PAGA claims are "legally and conceptually different from an employee's own suit for damages and statutory penalties," because "[a]n employee suing under PAGA 'does so as the *proxy or agent of the state's labor law enforcement agencies*.' [Citation.]" (*Ibid.*) Every PAGA action thus is a representative action on behalf of the state. (*Id.* at p. 87.) "'But a representative action under PAGA is not a class action.' [Citation.]" (*Ibid.*)

B. Analysis

The Supreme Court has held that class action requirements "need not be met when an employee's representative action against an employer is seeking civil penalties under" PAGA. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 975.) Manageability is a class action requirement. "In considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting the proposed class." (*Duran v. U.S. National Bank Association*, *supra*, 59 Cal.4th at p. 29.) The parties have not cited and we

have not located any California authority imposing an analogous requirement in PAGA actions. The trial court relied on *Williams v. Superior Court* (2017) 3 Cal.5th 531, 547 (*Williams*) as support for imposing a manageability requirement "on a class-wide basis," but we agree with plaintiffs that *Williams* does not support that proposition.

In *Williams*, the Supreme Court considered the scope of discovery in a representative PAGA action. (See *Williams*, *supra*, 3 Cal.5th at pp. 537-538.) The plaintiff, a retail store employee, alleged that his employer failed to provide meal and rest periods and sought to pursue civil penalties for the violations in a representative PAGA action. (*Id.* at pp. 538-539.) During discovery, the plaintiff sought to discover the names and contact information for all affected employees in the state. (*Id.* at p. 539.) The store opposed the request as overbroad and unduly burdensome, and the trial court agreed; it ordered the store to provide the requested information for the single store at which the plaintiff worked. (*Ibid.*) The plaintiff sought writ relief, which the appellate court denied. The Supreme Court "granted review to resolve issues of first impression concerning the appropriate scope of discovery in a PAGA action." (*Id.* at p. 540.)

In the course of resolving those issues, the Supreme Court rejected the appellate court's reasoning that the plaintiff's broad discovery request could be granted if he demonstrated a "uniform companywide policy." (*Williams*, *supra*, 3 Cal.5th at p. 559.) The Court explained: "A uniform policy may be a convenient or desirable way to show commonality of interest in a case where class certification is sought, but it is not a condition for discovery, or even success, in a PAGA action, where recovery on behalf of the state and aggrieved employees may be had for each violation,

whether pursuant to a uniform policy or not. [Citation.] This is not to say uniform policies play no role in PAGA cases; proof of a uniform policy is one way a plaintiff might seek to render trial of the action manageable. But nothing in PAGA or our privacy precedents suggests courts can or should condition disclosure of contact information, which might lead to proof of a uniform or companywide policy, on prior proof of a uniform or companywide policy." (*Ibid.*)

The trial court quoted this portion of *Williams* to support its assertion that "a representative plaintiff in an action under [PAGA] must seek to render trial of the action manageable." This was error. "Cases are not authority for propositions not considered therein." (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 614.) *Williams* neither considered nor held that plaintiffs in a PAGA action must demonstrate that trial of their claims is manageable on a class-wide basis.

Defendant Warren points to two unpublished federal trial court decisions that dismissed PAGA claims on manageability grounds: *Ortiz v. CVS Caremark Corp.* (N.D. Cal., March 18, 2014, No. C-12-05859 EDL) 2014 WL 1117614, and *Brown v. American Airlines, Inc.* (C.D. Cal., Oct. 5, 2015, No. CV-10-8431-AG (PJWx)) 2015 WL 6735217. "Where California cases have not addressed an issue, they look to federal cases as persuasive authority on class action questions." (*Collins v. Safeway Stores, Inc.* (1986) 187 Cal.App.3d 62, 73, fn. 6.) As noted above, however, PAGA claims are not class actions, and Warren has not explained why *Ortiz* and *Brown* are persuasive on this question of state law. Nor has it distinguished another unpublished federal case, *Plaisted v. Dress Barn, Inc.* (C.D. Cal., Sept. 20, 2012, No. 2:12–cv–01679–ODW (SHx)) 2012 WL 4356158, which

persuasively reasoned, "To hold that a PAGA action could not be maintained because the individual assessments regarding whether a violation had occurred would make the claim unmanageable at trial would obliterate" the purpose of PAGA, "as every PAGA action in some way requires *some* individualized assessment regarding whether a Labor Code violation has occurred."

Defendants SCL and SCT contend that "[i]t is irrational to argue that a trial of PAGA claims does not have to be manageable." They argue that, "[i]f, after four years of litigation, plaintiffs' PAGA claims had not been rendered manageable, the court was entitled to dismiss those claims" pursuant to its inherent power to control proceedings and court rules encouraging active management of complex cases. We do not disagree that the trial court has the inherent authority to assess the manageability of claims pending before it, nor that it may dismiss claims that prove unmanageable. However, in this particular instance, the trial court did not rely on that authority but instead expressly imposed "class-wide" manageability requirements on PAGA claims in connection with a class certification motion. That was error, but it does not preclude the trial court from revisiting the issue of the manageability of the PAGA claims pursuant to its inherent authority at some future point in the litigation.

DISPOSITION

The order denying class certification is reversed as to plaintiffs' rest period claim and dismissal of their PAGA claims. The remainder of the order is affirmed. On remand, the trial court is to reconsider the motion to certify a class on the rest

break claim and articulate the reasoning for its decision. The parties are to bear their own costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.